BEFORE THE COMMISSION ON PRACTICE
OF THE SUPREME COURT OF THE STATE OF MONTANA

In the Matter of)	Supreme Court Cause No. PR09-0384
)	ODC File No. 08-194
STEVEN S. CAREY,)	
an Attorney at Law,)	
Respondent.)	
)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION

This matter came on regularly for hearing before an adjudicatory panel the Commission on Practice ("Commission") at Missoula, Montana, on January 22, 2010. Commission members present and participating as an adjudicatory panel were Tracy Axelberg, Stephen R. Brown, Jr., Patricia DeVries, Jean E. Faure, Gene Huntington, Carey E. Matovich, Richard A. Ochsner, and John Warren. Disciplinary Counsel, Mr. Shaun Thompson, was present. Respondent was present and represented by Mr. Curt Drake and Mr. Timothy B. Strauch.

The Commission received oral and documentary evidence from the parties. The matter was submitted. The Commission now makes the following:

Findings of Fact

1. Respondent is an attorney who has been licensed to practice law in the State of Montana since 1984. He is subject to the disciplinary jurisdiction of the Supreme

Court of the State of Montana.

The Anderson Matter:

2. Shelly Anderson ("Anderson") suffered personal injuries and damages to her vehicle in an automobile accident on July 8, 2005. She hired Tracey Morin ("Morin"), an attorney employed by Respondent's law firm, to pursue her claims against the tortfeasor, Helen Dixon ("Dixon").[1]

3. Anderson negotiated directly with her insurer, Austin Mutual Insurance Company ("Austin Mutual"), concerning the damages to her vehicle. About the end of July, 2005, Austin Mutual paid Anderson $13,550 for her damaged vehicle less its salvage value. Thereafter, it was Morin's job to pursue Anderson's remaining tort claims against Dixon and her insurer, Allied Property and Casualty Insurance Company ("Allied").[2] Morin had exclusive responsibility for Anderson's case at Respondent's law firm.[3]

4. On September 19, 2005, Allied issued its check for $7,910.40 payable to Anderson, Respondent, and Austin Mutual. The $7,910.40 represented the balance of Dixon's insurance policy limits.[4] Respondent received Allied's $7,910.40 check and deposited it to his law firm's trust account on September 22, 2005. He endorsed the

---

[1] Trans at p. 108 - 109.

[2] Trans at p. 109 - 110.

[3] Trans at p. 39.

[4] See Exhibit 8.

check on Anderson's behalf, under the authority of her power of attorney, and as one of the payees. Neither Austin Mutual nor anyone on its behalf endorsed the check.[5]

5. On October, 2005, Morin disbursed the $7,910.40 from Respondent's trust account by paying one-third, or $2,686.13, representing Respondent's contingency fee and costs, to Respondent's law firm, and the balance to Anderson or for her benefit.[6] Anderson accepted and agreed to the division of the $7,910.40.[7]

6. Austin Mutual's adjuster, Tom Bernhardt ("Bernhardt") discovered Austin Mutual had not received the $7,910.40 in September, 2005. He wrote Morin on May 29, 2006, asserting that Austin Mutual was entitled to the $7,910.40 and demanding that Respondent's law firm pay the $7,910.40 to Austin Mutual.[8]

7. Morin discussed Austin Mutual's demand with Respondent. He authorized her to "pay [Austin Mutual] $5,000 to kick this can down the road."[9] Morin did so on June 16, 2006, disputing whether Austin Mutual was entitled to the money and writing that "Austin Mutual has a duty to ensure that Ms. Anderson is made whole and is put back in

---

[5] Trans at p. 14; see Exhibit 8.

[6] Trans at p. 15 - 16; see Exhibits 9, 11, and 511. Respondent's law firm paid $4,852.27 directly to Anderson. There was conflicting evidence about the remaining $372.00. Respondent testified he paid the $372 on Anderson's behalf to a payday lender (See Trans at p. 162 - 163), while Anderson testified she had received an advance from Morin for her payday loan and paid Respondent back with the $372 shown on Exhibit 511. See Trans at p. 146.

[7] Exhibit 511.

[8] Trans at p. 92 - 93; see Exhibit 13.

[9] Trans at p. 19.

the position she was prior to this accident."[10] Morin paid the $5,000 from Respondent's operating account, discussed the matter with Anderson, and charged the disbursement to her account as a cost.[11]

8. Anderson received a copy of Morin's letter covering the $5,000. Anderson was not asked to approve the payment. She understood the $5,000 was Respondent's money. No one advised her she would ultimately be responsible for the $5,000.[12]

9. In January, 2008, Morin left Respondent's law firm, taking Anderson's case with her, and joined the Smith and Jasper Law Firm.[13]

10. On February 6, 2008, Respondent notified Morin, her new law firm, and Anderson that Respondent asserted a lien against the proceeds of Anderson's case to secure her account at Respondent's law firm. Anderson's account amounted to $10,067.19, principally arising from the $5,000 Respondent paid to Austin Mutual, $3,000 Morin advanced to Anderson in anticipation of settlement, and $1,301.03 Respondent paid for mediation.[14]

11. Anderson's case settled for $100,000.[15] On July 29, 2008, her attorneys

---

[10] Exhibit 14.

[11] Trans at p. 22 and 129; see Exhibit 10.

[12] Trans at p. 112.

[13] Trans at p. 23.

[14] Trans at p. 23 - 24; Exhibits 3, 10, and 16.

[15] Trans at p. 122.

disbursed $10,067.19 to Respondent to fully settle his account.[16]

12. Respondent refunded the $2,636.80 fee he collected from Anderson for collection of Allied's check for $7,910.40.

Client Advances:

13. During the period September, 2005, through September, 2008, Respondent's law firm made 22 advances to six clients, the sum of which equaled $29,190. Respondent's $29,190 in advances to clients did not include, and were in addition to, the $5,000 his firm advanced on Anderson's behalf and paid to Austin Mutual. None of the $29,190 in client advances were for litigation expenses. Respondent testified the $29,190 in advances were improper under Rule 1.8(e).[17] The specifics relating to each client's advances follow:

14. Between September 27, 2005, and March 29, 2007, Respondent's firm made 19 advances by checks to his client, Patty Brandao, for her living expenses. Advances to Brandao totaled $10,000. Respondent signed all but three of the checks. Each check was for $500, except one for $1,000, and each bore the notation "Advance on settlement funds." Respondent paid or authorized the Brandao advances because his client was living at poverty level and because Respondent sought to financially sustain his client until resolution of her case.[18]

---

[16] Exhibit 20.

[17] Trans at p. 29 - 30.

[18] Exhibits 1 and 2; Trans at p. 66 - 68.

15. On October 12, 2007, Morin advanced $3,000 to Anderson from Respondent's account to enable her to pay medical bills.[19]

16. From May, 2006, to May, 2007, Morin signed 8 checks, or caused them to be signed, to pay a client, Sharon Conger, $3,650 as advances on her eventual settlement.[20]

17. Between June, 2006, and August, 2007, Morin signed 11 of 12 checks advancing $10,450 to Lucas Nelson, who was a client of Respondent's law firm.[21]

18. Respondent did not know of Morin's advances to Anderson, Conger, or Nelson until he audited her files in the Fall, 2007. Upon discovery of Morin's advances Respondent directed Morin not to make future similar advances. Their relationship soured. Shortly thereafter she departed his firm.[22]

19. On July 7, 2008, Respondent advanced his client, Bonnie Burchinal, $1,000 for travel expenses against anticipated settlement funds.[23]

20. On September 12, 2008, Respondent paid Ron Hansen $1,090 in anticipation of his receipt of a workers compensation check. Respondent did so to enable Hansen to attend his relative's funeral. Respondent was repaid within several

---

[19] Exhibit 1; Trans at p. 131.

[20] Exhibit 1.

[21] Exhibit 1.

[22] Trans at p. 30 - 32, 61 - 62, and 75 - 76.

[23] Exhibit 1; Trans at p. 65 - 66.

days.[24]

21. There was no evidence Respondent guaranteed a loan from a regulated financial institution to any of the clients of his firm for living expenses so as to enable his clients to withstand the delays of litigation.

Based on the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

The Anderson Matter:

22. Clear and convincing evidence does not prove Respondent violated Rule 1.15, MRPC, by his failure to notify Austin Mutual of his receipt of the $7,910.40; or by his failure to promptly deliver the $7,910.40 to Austin Mutual; or by his failure to segregate and hold the $7,910.40 in trust pending resolution of any dispute concerning the $7,910.40. Anderson was entitled to be made whole before Austin Mutual could assert its right of subrogation against Anderson and her $7,910.40 recovery in Respondent's care.[25] Furthermore, Austin Mutual had a duty to determine whether Anderson, as its insured, had been made whole before it was entitled to collect subrogation.[26] The evidence presented, particularly Anderson and her tortfeasor's subsequent $100,000 settlement, indicate Anderson had not been made whole when Allied paid the $7,910.40.

---

[24] Trans at p. 32 - 33, 69 - 70.

[25] See *Skauge v. Mountain States Telephone and Telegraph Co. et al.*, 172 Mont 521, 528, 565 P.2d 628 (1977), and its progeny.

[26] See Ferguson v. Safeco Insurance Co. et al., 2008 Mt 109, §19, 342 Mont. 380, 180 P.3d 1164.

Moreover, there was no evidence demonstrating Austin Mutual had shouldered its duty to determine whether Anderson had been made whole when it claimed the $7,910.40. While Austin Mutual's name was on Allied's $7,910.40 check, the evidence did not convince the Commission that Austin Mutual's claimed right of subrogation in the $7,910.40 was reasonably justified. Accordingly, the Commission concluded Respondent's retention of the $7,910.40 did not transgress Rule 1.15.

23. Clear and convincing evidence does not prove that Respondent violated Rules 1.2 or 1.4, MRPC, when he authorized Morin's payment of $5,000 to Austin Mutual and charged the payment to Anderson's account. Clearly, Anderson received a copy of Morin's letter covering the $5,000 payment to Austin Mutual, so Anderson knew about the payment. Furthermore, she acknowledged during her cross-examination that she and Morin discussed the payment. Upon settlement of her case Anderson consented to repayment of the $5,000 to Respondent while represented by independent counsel. At the same time Anderson expected to pay back $3,000 to Respondent which Morin advanced from his account to pay Anderson's medical bills. The Commission concluded the evidence proved Anderson was informed about the $5,000 payment, its charge against her account with Respondent, and her obligation to repay it.

24. Clear and convincing evidence does not prove Respondent violated Rule 1.5, MRCP, by collecting a fee on the $7,910.40 recovery. As explained above, the Commission concludes the evidence does not support Austin Mutual's subrogation claim against the $7,910.40. Respondent's collection of a fee on the $7,910.40 recovery was

consistent with Anderson's fee agreement. Morin's $5,000 payment to Austin Mutual from Respondent's account with his authorization was not an unreasonable cost of litigation and did not detract from the $7,910.40 recovery, particularly where Morin discussed the payment with Anderson and where she agreed to its repayment at settlement upon the advice of independent counsel.

Client Advances:

25. Clear and convincing evidence does not prove Respondent violated Rule 1.8(e), MRPC, with respect to the $5,000 payment to Austin Mutual. The Commission concludes the $5,000 payment was an expense of litigation paid on Anderson's behalf and not subject to Rule 1.8(e)'s restrictions.

26. Clear and convincing evidence does not prove Respondent provided financial assistance to Anderson (1 advance for $3,000), Conger (a series of 8 advances equaling $3,650), or Nelson (12 advances amounting to $10,450) in violation of the provisions of Rule 1.8(3), MRCP. Morin oversaw the advances to Anderson, Conger, and Nelson, which Respondent did not know about until his review of their files in the Fall, 2007. Upon discovery of Morin's advances Respondent directed her not to make future similar advances. It was not alleged that Morin's conduct should be attributed to Respondent.

27. Clear and convincing evidence proves Respondent provided financial assistance to Brandao (a series of 19 advances amounting to the sum of $10,000), Burchinal (1 advance for $1,000), and Hansen (1 advance for $1,090) in violation of Rule 1.8(3), MRCP. Respondent oversaw the advances to Brandao, Burchinal, and

Hansen. All were for living expenses, including Burchinal and Hansen's travel expenses, for Respondent's active clients. There was no evidence Respondent attempted to comply with the loan guarantee provisions of the rule. During his testimony Respondent acknowledged his advances were improper.

Based on the foregoing Findings of Fact and Conclusions of Law, the Commission unanimously recommends as follows:

Recommendation

28. That the allegations of Counts One, Two, and Three should be dismissed;

29. That the allegations of Count Four concerning advances to or on behalf of Anderson, Conger, and Nelson should be dismissed;

30. That for his violation of Rule 1.8(e), MRPC, respecting the advances to Brandao, Burchinal, and Hansen Respondent should be privately admonished and placed on probation for a period of one year on the condition that during his probationary period Respondent address a seminar approved for continuing legal education credit for not less than one hour on the topic of Rule 1.8, MRPC; and

31. That Respondent should be assessed with the costs of these proceedings subject to the provisions of Rule 9A(8), MRLDE

Dated this 18th day of May, 2010.

Commission on Practice

By _____
Its Chairperson

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of May, 2010, I served a copy of the foregoing *Findings of Fact, Conclusions of Law, and Recommendation* by mailing a copy thereof, postage prepaid to:

Shaun R. Thompson, Esq.
Disciplinary Counsel
PO Box 1099
Helena, MT 59624

Curt Drake, Esq.
Attorney for Respondent
PO Box 1181
Helena, MT 59624-1181

Timothy B. Strauch, Esq.
Attorney for Respondent
257 W Front Street, Ste A
Missoula, MT 59802

Shauna Ryan

Shauna Ryan, Office Administrator
COMMISSION ON PRACTICE